IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

BAYVIEW MANOR II MAINTENANCE CORPORATION,	
Plaintiff,))
v.	C.A. No. CPU4-10-007455
IDRIS M. ALKHATIB, and HELENA Y. ALKHATIB,	
Defendants,)))

Date Submitted: March 8, 2012 Date Decided: March 15, 2012

MEMORANDUM OPINION AND ORDER

Paul E. Bilodeau, Esquire, Losco & Marconi, P.A., 1813 N. Franklin Street, Wilmington, DE 19899.

Attorney for Plaintiff

Idris M. Alkhatib & Helena Y. Alkhatib, 501 Florence Fields Lane, Bayview Manor II, New Castle, DE 19720. *Pro se Defendants*

WELCH, J.

I. Facts & Procedural Posture

This is a debt collection action seeking payment for money allegedly owed pursuant to a residential real property deed restriction and maintenance declaration. On December 2, 2010, the plaintiff, Bayview Manor II Maintenance Corporation (the "Plaintiff"), filed a complaint (the "Complaint") against Idris M. Alkhatib and Helena Y. Alkhatib (the "Defendants"). In the Complaint, Plaintiff alleged that Defendants are required to pay yearly maintenance fees to Plaintiff pursuant to a recorded Maintenance Declaration. Plaintiff further alleged that as of the time of the Complaint, the Defendants had failed to pay maintenance fees in the amount of \$289.57. Finally, Plaintiff requested that the Court award Plaintiff pre judgment and post judgment interest in the amount stated in the maintenance declaration, 18% per annum, plus reasonable attorneys fees as stated in the maintenance declaration.

On January 20, 2011, Defendants filed an Answer to the Complaint. In the Answer, Defendants alleged that in April 2010, Defendant submitted a payment to Plaintiff in the amount of \$269.17, and attached a cancelled check purportedly representing this payment.

Trial was originally scheduled for September 13, 2011. On September 12, 2011, the Court granted the parties joint request for a continuance of the trial date. On December 14, 2011, the Court set this matter for trial on February 15, 2012. The Court mailed notice to both parties.

On February 9, 2012, the Defendants filed a Counterclaim against Plaintiff. In the Counterclaim, Defendants alleged that Plaintiff violated the provisions of the maintenance declaration, and sought monetary damages against Plaintiff in the amount of \$2,000.00.

On February 15, 2012, trial was held on the Plaintiff's Complaint. The Court declined to consider the Defendant's Counterclaim, because it was not timely filed and Defendants did not file a Motion to Amend the Complaint before trial.

At trial, the Court heard testimony from two witnesses. J. D. Lee ("Mr. Lee") testified during Plaintiff's case in chief. Mrs. Alkhatib testified during Defendants' case in chief. The Court also received several documents and photographs into evidence from both parties.¹

Mr. Lee testified that he currently lives in Bayview Manor II. Mr. Lee also serves as president of Bayview Manor II Maintenance Corporation (the "Maintenance Corp."). Mr. Lee does not receive any compensation for performance of his duties as president. Mr. Lee performs this service part time, and has a separate full time job as an engineer.

Mr. Lee testified that the Maintenance Corp. charges yearly assessment fees pursuant to the publicly filed "Maintenance Declaration for Bayview Manor II," and restrictions in the deeds in every home in the Bayview Manor II community.² Mr. Lee testified that the Deed to the Defendants' home, located at 501 Florence Fields Lane, contains this restriction.³ The maintenance declaration provides that if a resident subject to the declaration becomes delinquent in yearly

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¹ Plaintiff's Exhibit # 1 – a document titled "Maintenance Declaration For Bayview Manor II;" Plaintiff's Exhibit # 2 - the deed for 501 Florence Fields Lane, dated May 15, 2006; Plaintiff's Exhibit # 3 - a document titled "Re: Notice of Delinquent Payment of 2008 Bayview Manor II Annual Assessment," dated July 13, 2008, and addressed to Mr. & Mrs. Idris Alkhatib and a similar document dated February 26, 2010; Plaintiff's Exhibit # 4 - a document titled "Maintenance Corporation Assessment Statement Bayview Manor II Maint. Corp," dated December 17, 2007, indicating that the Alkhatib's owed \$162.32 in assessment fees, with payment due on January 31, 2008; Plaintiff's Exhibit # 5 – a letter from Counsel for Plaintiff, Paul E. Bilodeau, dated February 14, 2011, indicating that Plaintiff has no records of receiving or cashing a check for \$269.17; Plaintiff's Exhibit # 6 - a document titled "Bayview Manor II Annual Assessments," listing the amounts of the yearly assessments in the titled community from 2008 through 2012; Defendant's Exhibit #1 - A New Castle County receipt indicating that on May 2, 2011, Helena Alkhatib paid assessment fees for 501 Florence Fields Lane in the amount of \$399.52, and an attached statement indicating that that sum was comprised of \$240.97 in "prior balance," \$88.35 in "current amount," and \$70.20 in penalties. The statement is dated March 21, 2011, and indicates that payment was due on May 2, 2011; Defendant's Exhibit # 2 - a package of photographs of the Bayview Manor II community, showing various dirty and dilapidated areas of the community; and Defendant's Exhibit #3 – a letter signed by "The Board of Bayview Manor II," dated January 2, 2012, stating that there would be a community wide meeting on January 24, 2012, that the Board plans to actively pursue collections of delinquent assessment fees, and such collection methods will be discussed at the community wide meeting.

² Plaintiff's Exhibit # 1.

³ Plaintiff's Exhibit # 2.

maintenance fees, the Maintenance Corp. is entitled to bring legal action to recover the money owed, including costs of collection and reasonable attorney's fees.⁴

Mr. Lee testified that on July 13, 2008, a previous president of the Maintenance Corp. sent the Defendants a letter indicating that at that time the Defendants owed \$174.47 in delinquent maintenance assessment fees pursuant to the Maintenance Declaration and Deed. Mr. Lee testified that on February 26, 2010, he personally sent Defendants a second letter on behalf of the Maintenance Corp. demanding payment for \$181.64 in delinquent maintenance assessment fees. Each document states that New Castle County mailed three separate notices to Defendants providing that Defendants were delinquent in their maintenance assessment fees – meaning notices of delinquencies were likely sent to Defendants on six separate occasions between 2008 and 2010. Mr. Lee testified that it is his understanding that New Castle County mails these delinquency letters once per month for a period of three months to each homeowner delinquent in payment of assessment fees.

Additionally, Mr. Lee's February 26, 2010 letter states that the Maintenance Corp. has "engaged a law firm...to facilitate [collection] in the event that you fail to pay the Annual Assessment." This letter further provided that: "[y]ou will be responsible for interest, costs of collection, and reasonable attorney's fees required for undertaking such an action."

Mr. Lee testified that when neither the Maintenance Corp. nor New Castle County received payment for the unpaid fees as of December 2010, the Maintenance Corp. filed. Mr. Lee testified that at this time, the Defendants owed approximately \$289.00 in unpaid fees. Mr. Lee testified that this amount consisted of unpaid fees that became due and owing for years 2008, 2009, and 2010. Mr. Lee noted that when the Defendants filed their Answer to the Complaint, they attached a copy

⁵ Plaintiff's Exhibit # 3.

⁴ Plaintiff's Exhibit # 1.

⁶ Plaintiff's Exhibit # 3.

⁷ Plaintiff's Exhibit # 4.

of a check for \$269.17 purportedly representing their payment. However, Mr. Lee testified that neither the Maintenance Corp. nor New Castle County have any record of receiving payment in this amount. Mr. Lee testified that it is his understanding that on February 14, 2011, Counsel for Plaintiff sent the Defendants a letter on behalf of the Maintenance Corp. requesting that the Defendants provide a copy of the cancelled check referenced in the Complaint. Mr. Lee testified that to the best of his knowledge, the Defendants have not tendered the cancelled check in response to this letter.

Mr. Lee testified that since suit was filed in December 2010, the Maintenance Corp. and Defendants have had several informal discussion and exchanged emails in an attempt to settle this dispute outside of court. Mr. Lee testified that these negotiations were not successful, not because the Defendants disputed the amount of assessment fees owed, but because the parties could not compromise on the appropriate amount of attorney's fees incurred in attempting to collect this debt.

On cross examination, Mr. Lee testified that the assessment fees for years 2008 through 2012 were as follows: 2008 - \$40.16; 2009 - \$120.48; 2010 - \$80.83; 2011 - \$88.35; and 2012 - \$116.19. Mr. Lee testified that he was unsure of whether the \$289.00 in damages sought in the Complaint was the result of two or three years of unpaid fees. Mr. Lee testified that it is his opinion that this figure was comprised of unpaid fees plus interest.

Also on cross examination, Mr. Lee testified that he had no knowledge of the Defendants' payment habits prior to 2008, because he did not live in Bayview II at that time and was not involved in the Maintenance Corp. in any capacity at that time. Mr. Lee admitted that between 2008 and 2012, the Defendants did make some payments for the assessments, but argued that the Defendants did not make full payment.

Mrs. Alkhatib then testified during Defendants' case in chief. Mrs. Alkhatib testified that she paid the delinquent maintenance fees on May 2, 2011. Mrs. Alkhatib proffered a dated receipt in

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⁸ Plaintiff's Exhibit # 5.

support of this testimony.⁹ Mrs. Alkhatib testified at length on both direct and cross examination that she and Mr. Alkhatib did not pay the assessment fees when the fees were due and owing because they felt that the Maintenance Corp. was not performing its obligations with respect to upkeep of the community.¹⁰ The Defendants introduced a package of photographs into evidence in support of this argument.¹¹

Further, on both direct and cross examination, Mrs. Alkhatib testified that the Defendants do not dispute the amount of fees allegedly owed. Mrs. Alkhatib testified, rather, that the only reason the parties have not settled the case is that the parties dispute the proper amount of attorneys fees owed in this case.

Closing arguments were spent almost entirely on the issue of attorney's fees. Both parties agreed that as a result of the Defendants' May 2, 2011 payment, the Defendants are currently up to date on their assessment fee payments. Plaintiff argued that it is entitled to reasonable attorney's fees pursuant to the maintenance declaration, the deed, and statute – and that the fees it seeks qualify as reasonable attorney's fees. Defendants contended that they were justified in withholding payment initially based on the Maintenance Corp's failure to maintain the community, and that Defendants ultimately paid the fees in full. Ms. Alkhatib argued that Defendants should be required to pay \$450 in attorney's fees because the cancelled check attached to the Answer establishes that they attempted to make payment in April 2010. In other words, the Defendants argued that because in their opinion they allegedly attempted to pay the debt in April 2010, that New Castle County's failure to process this payment is not the Defendants fault. Therefore, Defendants argue that attorney's fees should be limited to \$405.00. This figure represents the amount of attorneys fees incurred as of April 2010.

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⁹ Defendant's Exhibit # 1.

¹⁰ Defendant's Exhibit # 2.

¹¹ Defendant's Exhibit # 2.

At the conclusion of trial and closing arguments, the Court took the matter under advisement. After trial, the Court determined that it required further briefing and legal argument on whether Plaintiff was limited in its request for attorney's fees by 10 *Del.C.* § 3912. Accordingly, the Court ordered the parties to submit legal memoranda on this issue. The parties have filed the requested memoranda. This is the Court's final memorandum opinion and order after consideration of the pleadings, the evidence and argument set forth on the record at trial, and the post trial memoranda.

II. Discussion

Defendants have paid the amount allegedly owed in the Complaint, so issue of whether Defendants are in breach of the maintenance declaration and deed is moot. Rather, as counsel for Plaintiff stated at trial, the sole issues at this stage of the proceedings are: (1) whether the plaintiff is entitled to attorney's fees incurred in attempting to collect the admittedly owed maintenance fees; (2) whether this award is required to be limited as a matter of law by 10 *Del.C.* § 3912; and (3) assuming the plaintiff is entitled to recover attorney's fees, whether the amount requested is reasonable. The Court finds that the plaintiff is entitled to attorney's fees, and that 10 *Del.C.* § 3912 does not apply to limit the award of attorney's fees. The Court finds further that Plaintiff must file an affidavit of attorney's fees before the Court can determine whether the requested amount of fees is reasonable.

First, Plaintiff is entitled to recover reasonable attorney's fees incurred in collection on this debt pursuant to the maintenance declaration and the deed on Defendants' home. Defendants do not dispute that they are bound by the terms of the maintenance declaration and deed. Rather, Defendants only dispute the amount of attorney's fees requested by the Plaintiff.

Second, the award of attorney's fees is not limited by 10 *Del.C.* § 3912. Ten *Del. C.* § 3912 governs counsel fees in actions on written instruments and provides as follows:

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¹² Plaintiff's Exhibits # 1, 2.

In all causes of action, suits, matters or proceedings brought for the enforcement of any note, bond, mechanics lien, mortgage, invoice or other instrument of writing, if the plaintiff or lien holder in the action, suit or proceeding recovers a judgment in any sum, the plaintiff or lien holder may also recover reasonable counsel fees, which shall be entered as a part of the judgment in the action, suit or proceeding. Such counsel fees shall not in any such action, suit or proceeding, exceed 20 percent of the amount adjudged for principal and interest. Such counsel fees shall not be entered as a part of such judgment unless the note, bond, mortgage, invoice or other instrument of writing sued upon, by the terms thereof, expressly provides for the payment and allowance thereof, except in cases of mechanics liens in which no express agreement shall be necessary in order to entitle the lien holder to reasonable counsel fees.

In enacting this statute, the Delaware General Assembly "was intending to deal with suits upon written instruments entered into voluntarily and *creating a debtor-creditor relationship.*" "Such instruments all contain an obligation to pay money and, when entered into, are ordinarily not expected to become the basis for a law suit." Accordingly, this Court has found that the statute does not apply to actions to collect delinquent assessment fees owed to condominium associations pursuant to the association's code of regulations, because at the time the regulations were enacted, no debtor-creditor relationship was established. Instead, codes of regulations, or in this case, maintenance declarations, are documents that govern the conduct of owners subject to these documents, that do not immediately and voluntarily create debtor-creditor relationships between parties subject to the document, by virtue of its execution. Therefore, the limitation on attorneys fees stated in 10 *Del.C.* § 3912 does not apply to limit the amount of attorney's fees requested in this case because the maintenance declaration is not a document within the purview or contemplation of this statute.

Finally, the issue of whether the amount of attorney's fees requested is reasonable is not ripe for adjudication because Plaintiff has not specified the specific amount of attorney's fees to which it

¹³ Council of the 1980 Superfine Lane Owners Ass'n v. Chalfant, 1990 WL 964520, at *1 (Del. Com. Pl. Mar. 9, 1990) (emphasis added) (citing Great American Indemnity Co. v. State, 88 A.2d 426 (Del. 1952)). ¹⁴ Id.

¹⁵ *Id.*

feels it is entitled. Therefore, Plaintiff is hereby ordered to file an affidavit of attorney's fees within ten days. After Plaintiff files this affidavit, Defendants may file a response on the sole issue of whether the attorney's fees requested in Plaintiff's affidavit qualify as reasonable attorney's fees. After the Court receives and reviews these filings, the Court will issue a written decision and order addressing whether the amount of attorney's fees requested by Plaintiff is reasonable.

III. Order

For the foregoing reasons, judgment is hereby entered in favor of Plaintiff against the Defendants. The Court further finds and holds that Plaintiff is entitled to reasonable attorney's fees incurred in pursuit of the claim. Plaintiff is hereby ordered to file an affidavit of attorney's fees within ten days. Defendants may file a response within ten days after Plaintiff's filing.

IT IS SO ORDERED this 15th day of March, 2012.

John K. Welch, Judge

cc: Ms. Tamu White, CCP, Chief Civil Clerk